UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MARC BENZ, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 97B00115
DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE TO PLEAD AND MOTION TO DISMISS

(September 8, 1997)

I. BACKGROUND

On May 28, 1997, Marc Benz (Complainant or Benz), through his representative John B. Kotmair, Jr.,[1] filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleges that the Department of Defense, Defense Finance and Accounting Service (Respondent) discriminated against him because of his citizenship status, Compl. ¶¶ 9-10, and committed document abuse by refusing to accept documents he presented, namely a Statement of Citizenship and an Affidavit of Constructive Notice, Compl. ¶ 16. Complainant states that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on February 5, 1997.[2] Compl. ¶ 18. The OSC charge reveals that the two documents in question purport to show that Complainant is not subject to income tax withholding. OSC Charge at 3-4. Complainant states that OSC sent him a letter that advised he could file a complaint directly with OCAHO. Compl. ¶ 19. Complainant requests back pay from June 1993. Compl. ¶¶ 20-21.

Respondent's answer to the Complaint was due July 7, 1997. As Respondent still had not

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[1] I have since excluded Mr. Kotmair from participation in this proceeding. See Order Excluding Complainant's Representative (Sept. 4, 1997).

[2] A copy of the letter that communicates Complainant's charge to OSC is attached as an exhibit to the Complaint.

filed an answer by July 29, 1997, I issued a Notice of Entry of Default on that date in which I warned that Respondent should act promptly in filing an answer to avoid a default judgment and should explain why an answer was not filed in a timely manner. On August 4, 1997, Respondent submitted its Motion for Leave to Plead and Motion to Dismiss Complaint, supported by an accompanying memorandum. Respondent states that I should dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. R. Mot. at 1; R. Mem. at 2-3.

Complainant was entitled to file a response to Respondent's Motion for Leave to Plead and Motion to Dismiss Complaint on or before August 19, 1997. See 28 C.F.R. §§ 68.11(b), 68.8(c)(2) (1996). Complainant, however, did not file a response until August 27, 1997.

II. STANDARDS GOVERNING A MOTION TO DISMISS

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 115 S. Ct. 2640 (1995). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. See Yamaguchi, 109 F.3d at 1481; Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997); Bent v. Brotman Medical Ctr. Pulse Health Servs., 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[3] (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5.

"[C]onclusory allegations of law and unwarranted inferences," however, are not assumed to be true. See Rosenbaum v. Syntex Corp. (In re Syntex Corp. Securities Litigation), 95 F.3d 922, 926 (9th Cir. 1996); see also Ott v. Home Savings & Loan Ass'n, 265 F.2d 643, 648 n.8 (9th Cir. 1958) (noting that the mere conclusions in the complaint are not assumed to be true). Also, the court "must not . . . assume plaintiffs can prove facts not alleged." Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983) (citing Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Id.

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. Gilligan, 108 F.3d at 248 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Bent, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; Zarazinski, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "In the case of a *pro se* action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." Powell v. Lennon, 914 F.2d 1459, 1463

[3] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

(11th Cir. 1990) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam)).

III. DECISION AND ORDER

A. Respondent's Motion for Leave to Plead

Federal Rule of Civil Procedure 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c). As I merely have entered Respondent's default and not an actual default judgment against Respondent, the standard found in Rule 55(c) is the appropriate one to apply. See Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 513 (9th Cir. 1986) ("The different treatment of default entry and judgment by Rule 55(c) frees a court considering a motion to set aside a default entry from the restraint of Rule 60(b) and entrusts determination to the discretion of the court.").

Despite the less stringent standard for setting aside an entry of default, courts consider the same factors utilized in setting aside a default judgment, such as (1) whether the default was culpable or willful, (2) whether setting aside the entry will prejudice the opposing party; and (3) whether the defaulting party has a meritorious defense to the action. See O'Connor v. State of Nevada, 27 F.3d 357, 364 (9th Cir. 1994), cert. denied, 514 U.S. 1021 (1995); Hawaii Carpenters, 794 F.2d at 513. "These Rule 60(b) grounds are liberally interpreted when used on a motion for relief from an entry of default." Id.; see also Mendoza v. Wight Vineyard Management, 783 F.2d 941, 945 (9th Cir. 1986) ("The court's discretion is especially broad where, as here, it is entry of default that is being set aside, rather than a default judgment."); O'Connor, 27 F.3d at 364. The application of the above factors to the present case weighs heavily in favor of setting aside my prior entry of default and allowing Respondent to plead.

Respondent did not fail to answer the Complaint in a timely fashion because of willful disregard or disrespect for the legal process. Instead, Respondent asserts that its delay in responding to the Complaint occurred because Respondent's Office of General Counsel failed to receive the Complaint as the result of an administrative oversight on the part of the personnel at the office to which the Complaint was sent. See R. Mem. at 2. Respondent states that it took action to prepare pleadings immediately upon receiving the Notice of Entry of Default. Id.

After learning of the action, Respondent's attorney indeed acted swiftly, filing a notice of appearance and the present motions within six days of the date I issued the Notice of Entry of Default. Complainant would suffer no prejudice if I grant Respondent's request to set aside the default because a relatively short amount of time has elapsed since Complainant filed his Complaint and, as Respondent notes, see id. at 2, because of the likelihood of lack of success of Complainant's claims.

Finally, it seems likely that Respondent presents a meritorious defense to the Complaint. A number of cases, all alleging facts and causes of action that are nearly identical to those asserted in

the present Complaint, have been filed with OCAHO Administrative Law Judges, and all such cases have been dismissed at early stages for failure to state a claim, lack of subject matter jurisdiction, or both. See Lee v. AT&T, OCAHO Case No. 97B00031 (Aug. 26, 1997); Manning v. City of Jacksonville, 7 OCAHO 956 (1997); Hendrickson v. GTE Communication Systems Corp., OCAHO Case No. 97B00089 (Aug. 14, 1997); Gayle Davis v. GTE Florida Inc., OCAHO Case No. 97B00088 (Aug. 14, 1997); John Davis v. GTE Florida Inc., OCAHO Case No. 97B00087 (Aug. 14, 1997); Horst v. Juneau Sch. Dist., 7 OCAHO 975 (1997); Hogenmiller v. Lincare, Inc., 7 OCAHO 953 (1997); Eldon Hutchinson v. GTE Data Servs., 7 OCAHO 954 (1997); Hollingsworth v. Applied Research Assocs., 7 OCAHO 942 (1997); Janet Hutchinson v. End Stage Renal Disease Network of Fla., Inc., 7 OCAHO 939 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938 (1997); D'Amico v. Erie Community College, 7 OCAHO 948 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934 (1997); Werline v. Public Serv. Elec. & Gas Co., 7 OCAHO 935 (1997); Lareau v. USAir, Inc., 7 OCAHO 932 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929 (1997); Jarvis v. AK Steel, 7 OCAHO 930 (1997); Winkler v. West Capital Financial Servs., 7 OCAHO 928 (1997); Smiley v. City of Philadelphia Dep't of Licenses & Inspections, 7 OCAHO 925 (1997); Austin v. Jitney-Jungle Stores of America, Inc., 6 OCAHO 923 (1997), 1997 WL 235918; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919 (1997), 1997 WL 242208; Costigan v. NYNEX, 6 OCAHO 918 (1997), 1997 WL 242199; Boyd v. Sherling, 6 OCAHO 916 (1997), 1997 WL 176910; Winkler v. Timlin Corp., 6 OCAHO 912 (1997), 1997 WL 148820; Horne v. Town of Hampstead, 6 OCAHO 906 (1997), 1997 WL 131346; Lee v. Airtouch Communications, 6 OCAHO 901 (1996), 1996 WL 780148, appeal filed, No. 97-70124 (9th Cir. 1997); Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892 (1996), 1996 WL 670179, appeal filed, No. 96-3688 (3d Cir. 1996).

Weighing all the above factors, I find that Respondent has shown good cause to set aside the entry of default. I grant Respondent's Motion for Leave to Plead and set aside the prior entry of default.

B. Respondent's Motion to Dismiss Complaint

1. Lack of subject matter jurisdiction

Respondent argues that I do not have subject matter jurisdiction over the present controversy because of Complainant's ongoing employment relationship with Respondent. See R. Mem. at 3.[4]

[4] Respondent also argues that subject matter jurisdiction is lacking because the Equal Employment Opportunity Commission (EEOC) previously exercised jurisdiction over Complainant's citizenship status discrimination claim in an EEOC charge that arose from the same set of facts as the present OCAHO case. See R. Mem. at 2-3. Respondent misunderstands the statutory provision that prohibits overlap between OSC and EEOC charges. The relevant statute provides that a charge of national origin discrimination cannot be brought before OSC if a charge of national origin discrimination based on the same set of facts was filed with EEOC and EEOC exercised jurisdiction over it. See 8 U.S.C. § 1324b(b)(2) (1994). An EEOC

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Complainant alleges that Respondent discriminated against him because of his citizenship status, Compl. ¶¶ 9-10, but he does not allege that Respondent either refused to hire or fired him, id. ¶¶ 13-14.[5] Respondent confirms Complainant's continuing employment relationship with Respondent. See R. Mem. at 3.

"It is established OCAHO jurisprudence that administrative law judges have § 1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment." Horne, 6 OCAHO 906, at 5, 1997 WL 131346, at *4 (citing Naginski v. Department of Defense, 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *23). "Controversies over conditions of employment do not implicate the jurisdictional requirements of § 1324b." D'Amico, 7 OCAHO 948, at 10 (citing Costigan, 6 OCAHO 918, at 5, 1997 WL 242199, at *3, and Horne, 6 OCAHO 906, at 6, 1997 WL 131346, at *4). Consequently, I do not have subject matter jurisdiction over Complainant's citizenship status discrimination claim. See Hendrickson, OCAHO Case No. 97B00089, at 5 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 5 (Aug. 14, 1997); John Davis, OCAHO Case No. 97B00087, at 5 (Aug. 14, 1997); Eldon Hutchinson, 7 OCAHO 954, at 6 (complainant neither fired nor not hired because he resigned); Hollingsworth, 7 OCAHO 942, at 3, 5; Janet Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12, 23 ; D'Amico, 7 OCAHO 948, at 10-11; Lareau, 7 OCAHO 932, at 13; Mathews, 7 OCAHO 929, at 17; Jarvis, 7 OCAHO 930, at 7-8 (complainant neither fired nor not hired because he retired voluntarily); Smiley, 7 OCAHO 925, at 18-19; Austin, 6 OCAHO 923, at 19, 1997 WL 235918, at *14; Costigan, 6 OCAHO 918, at 4, 1997 WL 242199, at *3; Horne, 6 OCAHO 906, at 4, 1997 WL 131346, at *3.

I also lack subject matter jurisdiction over Complainant's document abuse claim. Complainant alleges that Respondent refused to accept the following documents: a "Statement of Citizenship" and an "Affidavit of Constructive Notice." Compl. ¶ 16(a). The Immigration Reform and Control Act of 1986 (IRCA) provides that

> a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. § 1324b(a)(6) (1994) (emphasis added). Section 1324a(b) delineates requirements

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[4](...continued)
adjudication or other disposition of a national origin discrimination claim, however, does not affect Complainant's ability to file allegations of citizenship status discrimination with OSC and OCAHO. Consequently, Respondent's argument is without merit.

[5] In fact, Complainant has left completely blank the portions of the OCAHO form complaint that ask Complainant to state whether he was discriminatorily fired or not hired.

of the employment eligibility verification system; among those requirements, an employer, within three business days of the date of hire, must examine documents presented by the employee that establish the employee's identity and eligibility to work in the United States. Id. § 1324a(b)(1); 28 C.F.R. § 274a.2(b)(ii) (1997).

Only certain types of documents are acceptable for establishing an employee's identity and/or work authorization. [6] The documents Complainant asserts Respondent refused to accept, a Statement of Citizenship and an Affidavit of Constructive Notice, are not among the types of documents acceptable to show an employee's identity and/or employment eligibility.[7] Complainant's allegation, therefore, fails to implicate the employment eligibility verification system. "[S]ection 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement." Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; accord AT&T, OCAHO Case No. 97B00031, at 8-10 (Aug. 26, 1997); Hendrickson, OCAHO Case No. 97B00089, at 6-7 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 6-7 (Aug. 14, 1997); John Davis, OCAHO Case No. 97B00087, at 6-7 (Aug. 14, 1997); Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12,23; D'Amico, 7 OCAHO 948, at 11-13; Cholerton, 7 OCAHO 934, at 13-14; Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 7-8; Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 20, 1997 WL 235918, at *15; Wilson, 6 OCAHO 919, at 16-17, 1997 WL 242208, at *13; Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6.

Complainant does not even allege that he presented the documents to establish identity and/or work eligibility;[8] consequently, the Complaint itself shows that Complainant's claim fails to implicate

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[6] For purposes of this case, acceptable documents are noted at 8 U.S.C. § 1324a(b)(1)(B)-(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C) (1997). Section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amends the INA to restrict the types of acceptable List A and List C documents, but only with respect to hires that occur after a date, to be set by the Attorney General, that falls within one year after the September 30, 1996 enactment date. See Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412(e)(1), 110 Stat. 3009. Therefore, the prior, and more expansive, lists of acceptable documents continue to apply to this case.

[7] Although a Certificate of U.S. Citizenship, INS Form N-560 or N-561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. § 1324a(b)(1)(B)(ii) (1994) and 8 C.F.R. § 274a.2(b)(v)(A)(*2*) (1997), Complainant's Statement of Citizenship is not such a document.

[8] In the part of the OCAHO form complaint that inquires whether "[t]he

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the employment eligibility verification system. As a result of the foregoing, I am compelled to dismiss Complainant's document abuse claim because I lack subject matter jurisdiction over Complainant's particular allegations.

2. Failure to state a claim

IRCA only governs claims by protected individuals of citizenship status discrimination when the individual is fired or not hired. See 8 U.S.C. § 1324b(a)(1) (1994); 28 C.F.R. § 44.200(a)(1) (1997); see also, e.g., D'Amico, 7 OCAHO 948, at 10; Horne, 6 OCAHO 906, at 5-6, 1997 WL 131346, at *4.

Assuming that the facts alleged in the Complaint are true, and construing those facts in the light most favorable to Complainant, Complainant nonetheless fails to state a viable claim of citizenship status discrimination under 8 U.S.C. § 1324b. Complainant states that he is a U.S. citizen, see Compl. ¶ 2, which means that he qualifies as a "protected individual" under the statute, see 8 U.S.C. § 1324b(a)(3)(A) (1994). As previously noted, however, Complainant does not allege that he either was refused employment or was fired from his job. See Compl. ¶¶ 13-14. Complainant has not alleged the type of treatment that constitutes discrimination under section 1324b and, therefore, fails to state a claim upon which relief may be granted with respect to citizenship status discrimination. See Hendrickson, OCAHO Case No. 97B00089, at 7-8 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 7-8 (Aug. 14, 1997); John Davis, OCAHO Case No. 97B00087, at 8 (Aug. 14, 1997); Hollingsworth, 7 OCAHO 942, at 3, 5; Janet Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 13; Lareau, 7 OCAHO 932, at 13; Mathews, 7 OCAHO 929, at 17; Jarvis, 7 OCAHO 930, at 4; Smiley, 7 OCAHO 925, at 26; Austin, 6 OCAHO 923, at 19, 1997 WL 269376, at *14; Wilson, 6 OCAHO 919, at 15, 1997 WL 242208, at *12; Costigan, 6 OCAHO 918, at 8-9, 1997 WL 242199, at *6.

In addition, Respondent states that Complainant has failed to state a claim of citizenship status discrimination because he has not alleged that Respondent treated him differently from other similarly situated employees of different citizenship status. See R. Mem. at 3. It is true that Complainant does not allege disparate treatment as part of his citizenship status discrimination claim. See Compl. ¶ 14(e) (inquiry regarding disparate treatment left completely blank). Complainant's failure to allege disparate treatment as part of his citizenship status discrimination claim provides additional grounds for dismissing the Complaint for failure to state a claim of citizenship status discrimination.[9] See

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[8](...continued)
Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [he] can work in the United States." Compl. ¶ 16.

[9] Complainant confuses his citizenship status discrimination claim and his document abuse claim in responding to Respondent's disparate treatment argument. Complainant quotes a portion
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AT&T, OCAHO Case No. 97B00031, at 10-11 (Aug. 26, 1997); Hogenmiller, 7 OCAHO 953, at 5-6; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 13; Cholerton, 7 OCAHO 934, at 11-12; Costigan, 6 OCAHO 918, at 8-9, 1997 WL 242199, at *6; Boyd, 6 OCAHO 916, at 23-24, 1997 WL 176910, at *20-21; Timlin Corp., 6 OCAHO 912, at 8-10, 1997 WL 148820, at *7-8; Airtouch, 6 OCAHO 901, at 10, 1996 WL 780148, at *8-9.

In addition to the jurisdictional defect, Complainant has failed to state a claim of document abuse upon which relief may be granted. Complainant alleges that Respondent refused to accept his Statement of Citizenship and his Affidavit of Constructive Notice, but Complainant specifically negates the idea that Respondent refused those documents during the employment eligibility verification process. See supra note 8 and accompanying text. Also, as Respondent appropriately notes, see R. Mem. at 3, those documents are not even acceptable for showing an employee's identity and/or work authorization as part of the employment eligibility verification process. See supra notes 6 and 7 and accompanying text.

Assuming that all of Complainant's factual allegations in the Complaint are true, and construing those assumed facts in the light most favorable to Complainant, Complainant still fails to state a claim of document abuse. As I stated on a prior occasion:

> IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA.[10]

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[9](...continued)
of Westendorf v. Brown & Root, Inc., 3 OCAHO 477 (1992), 1992 WL 535635, although he does not provide a citation for the quoted segment, for the proposition that disparate treatment is not an element of a document abuse claim. See C. Reply to Mot. Dismiss at 10. That is a true statement. See Westendorf, 3 OCAHO 477, at 9 n.6, 1992 WL 535635, at *8 n.6. Complainant apparently fails to understand that Respondent's disparate treatment argument is made with respect to the citizenship status discrimination claim. As even Westendorf confirms, see id. at 12, 1992 WL 535635, at *7-8, disparate treatment is a necessary element of a citizenship status discrimination claim.

[10] Complainant maintains that "[d]ispite (sic) Respondents (sic) assertions, the legally mandated acceptance under 1324b(a)(6) is not in any way limited to 'for purposes of satisfying the requirements of section 1324a(b),' as Congress has studiously omitted any such limitation." C. Reply to Mot. Dismiss at 7. Contrary to Complainant's assertions, that language of limitation expressly appears in the statute, see supra part III.B.1, and applies to the provision regarding an employer's refusal to honor documents that appear to be genuine and to relate to the individual
(continued...)

Costigan, 6 OCAHO 918, at 9-10, 1997 WL 242199, at *7. Another Administrative Law Judge's recent holding also is particularly apt:

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [the complainant] asserts that [the respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine.

Airtouch, 6 OCAHO 901, at 13, 1996 WL 780148, at *10; see also AT&T, OCAHO Case No. 97B00031, at 11-12 (Aug. 26, 1997); Hendrickson, OCAHO Case No. 97B00089, at 8-9 (Aug. 14, 1997); Gayle Davis, OCAHO Case No. 97B00088, at 8-9 (Aug. 14, 1997); John Davis , OCAHO Case No. 97B00087, at 8-9 (Aug. 14, 1997); Horst, 7 OCAHO 975, at 3-4; Hogenmiller, 7 OCAHO 953, at 4; Hollingsworth, 7 OCAHO 942, at 3, 5; Hutchinson, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12; D'Amico, 7 OCAHO 948, at 14; Cholerton, 7 OCAHO 934, at 13-14; Werline, 7 OCAHO 935, at 8 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 6; West Capital Fin. Servs., 7 OCAHO 928, at 11 (1997); Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 19-20, 1997 WL 235918, at *15; Wilson, 6 OCAHO 919, at 16, 1997 WL 242208, at *12-13; Boyd, 6 OCAHO 916, at 26-27 (1997), 1997 WL 176910, at *21-22; Timlin Corp., 6 OCAHO 912, at 6, 10-12 (1997), 1997 WL 148820, at *6, 9-11. Consequently, Complainant fails to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).

IV. CONCLUSION

I grant Respondent's Motion for Leave to Plead by setting aside my prior Notice of Entry of Default. Taken together, the circumstances weigh decidedly in favor of granting Respondent's Motion, especially in consideration of strong judicial preference for adjudication on the merits, see Mendoza, 783 F.2d at 945-46; D'Amico v. Erie Community College, 7 OCAHO 927, at 2-3 (1997) (Order Denying Complainant's Motion for Default Judgment).

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[10](...continued)
presenting them, see cases cited in the remainder of part III.B.2.

After considering the parties' pleadings, I grant Respondent's Motion to Dismiss.[11] Assuming that every fact Complainant has alleged is true,[12] I make the following findings:

1. I lack subject matter jurisdiction over Complainant's citizenship status discrimination and document abuse claims; and

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[11] Pro se civil rights complainants should be given a chance to amend their complaints to correct any deficiency unless it clearly appears that amendment cannot overcome the deficiency. See Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980). A court, however, "does not err in denying leave to amend where the amendment would be futile or where the amended complaint would be subject to dismissal." Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) (internal citation omitted). Granting Complainant an opportunity to amend his Complaint in the present case would be futile. First, the long line of previously cited precedent reveals that allowing Complainant to amend his Complaint would serve no useful purpose. Also, the Complaint does not fail because it suffers from errors of a hypercritical, technical legal nature that only those people schooled in the law could be expected to understand. The complaint in cases brought under section 1324b consists of a form that elicits the pertinent information from a complainant. The form complaint seeks information, many times with questions that demand simple "yes" or "no" answers, that set forth the elements of the causes of action that this forum recognizes. For example, paragraphs 13 and 14 of the form complaint demand affirmative or negative responses to the following statements, respectively: "I was knowingly and intentionally not hired" and "I was knowingly and intentionally fired." In this case, Complainant has chosen to leave both of his options, lines clearly and conveniently marked "Yes" and "No," for each of those questions completely blank. No one could seriously entertain any notion that Complainant failed to provide a necessary response because the information requested was incomprehensible or was demanded in a cryptic manner.

[12] Complainant vehemently insists that "as in all cases that have been brought before the Office of [the] Chief Administrative Hearing Officer (OCAHO) by the Director of the National Worker's Rights Committee, the respondents have been able (with the help of Administrative Law Judges 'ALJ's' (sic)) to get away with discriminatory practices without disproving the Complainant's facts involving the discrimination." C. Reply to Mot. Dismiss at 1-2. Complainant fails to understand that, for purposes of deciding a motion to dismiss, **I assume that every fact he has alleged is true**. See supra part II. Disposing of a claim on the grounds of lack of subject matter jurisdiction and failure to state a claim means it is not necessary to move to a hearing stage in which Complainant would have to prove his allegations, because, even assuming that all the facts Complainant alleges are true, **those facts would not entitle Complainant to any relief in this forum**.

2. Complainant's allegations of citizenship status discrimination and document abuse fail to state causes of action upon which this forum may grant relief.

For those reasons, Complainant's Complaint is dismissed.

As provided by statute, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.53(b).

SO ORDERED.

Dated and entered this 8th day of September, 1997.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 1997, I have served the foregoing Order Granting Respondent's Motion for Leave to Plead and Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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Office of the Chief Administrative Hearing Officer
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(Hand Delivered)

_____

Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
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